In the High Court of Judicature at Madras

Dated: 07/03/2003

Coram

The Hon'ble Mr. Justice P. SATHASIVAM

Writ Petition No.45014 of 2002 and Writ Petition No. 43274 of 2002
and
WPMP.Nos.63665 & 65825 of 2002

Mary John .. Petitioner in WP.45014/02
C. Jacob .. Petitioner in WP.43274/02

-Vs-

1. The State of Tamil Nadu
rep. by its Secretary
Home Department
Fort St. George, Chennai 600 009.

2. Deputy Director of Prosecution
No.45 Langar Kana Street
Palayamkottai
Tirunelveli 2.

3. The District Collector
Nagercoil, Kanyakumari District.

4. The Inspector of Police
Nithiravillai Police Station
Kanyakumari District.

5. Thiyaga Rajan
Assistant Public Prosecutor
Grade I, Judicial Magistrate
Court No.II, Tirunelveli. .. Respondents in both Wps.,

For petitioner : Mr.R. Srinivasan
in WP.43274/02

For petitioner : Mr.M. Muthappan
in WP.45014/02

For respondents : Mrs. G. Kavitha
Government Advocate

:COMMON ORDER

Since the issue raised in both the writ petitions is one and the same, they are being disposed of by the following common order.

2. In both the writ petitions, the petitioners are seeking to issue a writ of mandamus directing the respondents to forbear from conducting the case in S.C.No.178 of 2001 on the file of Principal Sessions Judge, Nagercoil with the 5th respondent as a Special Public Prosecutor and without appointing a competent Public Prosecutor in accordance with law.

3. The case of the petitioners is briefly stated hereunder:

The petitioner in W.P.No.43274 of 2002, is the ninth accused and the petitioner in W.P.No.45014 of 2002 is the first accused in S.C.No.178 of 2001 respectively on the file of Principal Sessions Judge, Nagercoil. The 4th respondent - Inspector of Police, Nithiravillai Police Station, Kanyakumari District filed a case against the petitioners and 31 others in Crime No.40 of 1994, which after the filing of the charge sheet was numbered as P.R.C.No.8 of 1997 on the file of Judicial Magistrate II, Kuzhithurai and is now pending as S.C.No.178 of 200 1 on the file of Principal Sessions Judge, Nagercoil. The 4th respondent has filed a charge sheet against them under Sections 147, 148, 341, 324, 325, 307, 302 of IPC read with 149 and 109 of IPC. It is further stated that two more cases are pending with regard to the occurrence which took place on the same date, in which other person who is said to be the petitioners side was murdered, with regard to which the case is pending in S.C.No.70 of 2002 on the file of Principal Sessions Judge, Nagercoil involving offences under Sections 148, 323, 3 07 read with 149 and 302 r/2 149 of IPC against 8 persons and another case based on a private complaint given by Sirulin, who is also from the petitioners side against 19 persons for offences under Sections 147, 148, 149, 324, 326 in S.C.No.97 of 2002 on the file of the Principal Sessions Judge, Nagercoil. By order dated 06.11.2001 in Criminal O.P.No.20419 of 2001, this Court (P.D. Dinakaran,J.,) directed to dispose of all the above cases within three months from the date of receipt of a copy of the order. The said cases were transferred and brought to the Court of Principal Sessions Judge, Nagercoil. In the meanwhile, the Public Prosecutor, who was in charge of the prosecution, filed a memo that he is not in a position to appear before the prosecution of the above cases, therefore, the Principal Sessions Judge, Kanyakumari District has by his letter dated 21.11.2002, informed the second respondent that 3 Special Public Prosecutors have to be appointed immediately to conduct the above cases. Thereafter, the Principal Sessions Judge, by letter dated 26.11.2002, circulated an official memorandum that three Special Public Prosecutors have been appointed by the 2nd respondent in Roc.No.A657 of 2002 and informed to the Principal Sessions Judge, Nagercoil through telephonic message. The Principal Sessions Judge, Nagercoil, based on the said letter, has directed, Thiru Thiyagarajan, A.P.P. Grade I to Judicial Magistrate Court II, Tirunelveli; Thiru Vairavan Pillai, A.P.P. Grade I to District Munsif cum Judicial Magistrate Court, Cheramadevi and Thiru Nagarajan, A.D.P. to Chief Judicial Magistrate's Court, Nagercoil to appear in Court on 28.11.2002 in the above cases. Since the appointment of 5th respondent in both the writ petitions are illegal and not permissible, filed the above writ petitions.

4. The second respondent, Deputy Director of Prosecution, Palayamkottai has filed a separate, but identical counter affidavit, wherein it is stated that considering the urgency in complying with the direction of this Court as well as the request of the Principal Sessions Judge that all the three sessions cases, namely S.C.Nos.178 of 2001, 70 of 2002 and 97 of 2002 are to be disposed of within the prescribed time, the second respondent passed an order dated 22.11.2002, deputing three Assistant Public Prosecutors Grade I to conduct the said three sessions cases. Pursuant to the said order, the learned Principal Sessions Judge circulated the official memorandum dated 26.11.2002, directing the 5th respondent and other two Assistant Public Prosecutors Grade I to appear before his Court. The 5th respondent and two others were appointed in the year 1983 and they are the regular Assistant Public Prosecutors Grade I having 20 years of service in the prosecution side. As per Section 24 (9) of Cr.P.C., the three Assistant Public Prosecutors were deputed to conduct the cases in Sessions Court. The second respondent committed a mistake in using the term " Special Public Prosecutor" in his order. After deputing the three Assistant Public Prosecutors to conduct the trial of the cases by holding an additional charge, the second respondent had requested the Director of Prosecution, Chennai to pass orders ratifying his order dated 22.11.2002 and to recommend the Government to issue Government Order (G.O.) to that effect.

5. Heard, Mr. R. Srinivasan and Mr. Muthappan, learned counsel for the petitioners and Mrs. G. Kavitha, learned Government Advocate for the respondents.

6. The only question that arises for consideration in both the writ petitions is, whether the appointment of 5th respondent as Special Public Prosecutor to conduct the case in S.C.No.178 of 2001 on the file of Principal Sessions Judge, Nagercoil is in accordance with law and the same is sustainable?

7. The writ petitioners are first accused and the ninth accused in S.C.No.178 of 2001, now pending on the file of Principal Sessions Judge, Nagercoil. Both of them were charge sheeted for an offence under Sections 147, 148, 341, 324, 325, 307, 302 of IPC read with 149 and 109 IPC. When the petitions filed by the accused in Criminal O.P. No.20419 of 2001 in this Court for quashing the case in S.C.No.178 of 2 001, this Court by order dated 06.11.2001, directed the disposal of S.C.No.178 of 2001 and other connected cases within three months from the date of receipt of a copy of the said order. Pursuant to the said direction, it is seen that the Principal Sessions Judge, Kanyakumari has requested the second respondent for appointment of three Special Public Prosecutors immediately to conduct the above cases. It is further seen from the official memorandum D.No.6976 of 2002 of the Principal Sessions Judge, Kanyakumari at Nagercoil, the 5th

respondent, namely Thiru. Thiyagarajan, A.P.P. Grade-I, J.M. Court No.II, Tirunelveli and two others have been appointed as Special Public Prosecutors to conduct the prosecution in S.C.No.178 of 2001 etc., and the learned Sessions Judge has also informed that the said cases stand posted to 28.11.2002 for framing charges. Since the order appointing the 5 th respondent as Special Public Prosecutor has not been placed before this Court, it is useful to refer the official memorandum of the learned District Judge, which reads as under.

" JUDICIAL DEPARTMENT (CRIMINAL)
MOST URGENT
D.No.6976/2002 Principal Sessions Court
Kanniyakumari at Nagercoil
Dt.26.11.2002.
OFFICIAL MEMORANDUM
Sub: Courts - Criminal Cases - S.C.Nos.178/2001, 70/2002 (respective Crime Nos.40 and 41/P4 of Nithiravilai P.S.) and S.C.No.97/2002 (Private Complaint) of the Court - High Court's direction to dispose of the cases by joint trial within three months from 16.10.2002 - Present Public Prosecutor's inability to appear for the prosecution cases - Appointment of three Special Public Prosecutors - regarding.

Ref: 1.Letter of High Court, Madras dated 21.10.2002 in Tapal No.7457/2002/Crl.Section

2.Letter of this dt.21.11.2002 in D.No.6914/2 2002 addressed to the Deputy Director of Prosecution, Tirunelveli.

3.Phone message from the Office of the D.D. of Thirnelveli in connection with the letter of D.D.P., Thirnelveli in Roc.No.A/657/ 2002 Dt.22.11.2002 appointing the below mentioned 3 Special Public Prosecutors.
..

With reference to the above facts, it is informed through phone message 3rd referred to above, in respect to the letter 2nd referred to above, that Thiru Thiyagarajan, A.P.P., Grade I C.M. Court No.II, Thirunelveli, Thiru Vairavan Pillai, A.P.P. Grade I, D.M. Cum J.M's Court, Seramadevi and Thiru Nagarajan A.D.8 C.J.M's Court, Nagercoil have been appointed as Special Public Prosecutors to conduct prosecution taken respectively in S.C.Nos.178/2001, 70/2002 and 97/2002 of this Court and the above said cases stand posted to 27.11.2002 for framing charges. Hence the above noted Special P.P's are requested to appear before this Court on 28.11.2002 without fail. This may kindly be treated as most urgent. In view of the direction of the High Court Madras 1st referred to above.
By Order

To
1. Thiru. Thiyagarajan,A.P.P. Grade I
J.M's Court, No.II Thirunelveli.
2. Thiru Vairavan Pillai, A.P.P. Gr.I,
D.M. - cum-J.M's Court, Sermadevi.
3. Thiru Nagarajan, A.D.P. J.C.J.M's Court, Nagercoil
4. Copy to: D.D.P. Thirunelveli
2. The Inspector of Police
Nithirevilai. "

Reference 3 of the above memorandum shows that the learned Principal Sessions Judge received a telephone message from the Deputy Director of Prosecution, Tirunelveli II - second respondent herein appointing three Special Public Prosecutors including the 5th respondent to conduct S.C.No.178 of 2001 and two other cases, which are pending before the Principal Sessions Court, Kanyakumari at Nagercoil.
8. It is also relevant to refer the letter of the Deputy Director of Prosecution (i/c) Tiruneveli dated 22.11.2002 addressed to the Principal District Judge, Kanyakumari at Nagercoil. The operative portion is reproduced hereunder:
"From To
M. Gunasekaran The Principal District Judge
Deputy Director of Kanniyakumari at Nagercoil.
Prosecution (I/C)
Tirunelveli.
Roc.No.A/657/2002 dated 22.11.2002.

Honourable Judge,
Sub:.....
Ref:.....
With reference to the above facts, it is hereby informed to this Honourable Court that the following Officers are appointed as a Special Public Prosecutors to conduct cases as stated in the reference cited.
Thiru S. Thiagarajan, Asst. Public Prosecutor, Grade-I, CCIW, Judicial Magistrate Court, No.II, Tirunelveli is appointed and to act as Special Public Prosecutor at District Sessions Court, Nagercoil to conduct Sessions Case pending in S.C.No.178/2001 on the file of District Sessions Court, Nagercoil, whenever it is posted for trial.
.....
.....
.....
Deputy Director of Prosecution
Tirunelveli. "
It is clear from the above communication that Mr. S. Thiyagarajan, A.P.P. Grade I, CCIW, Judicial Magistrate's Court No.II, Tirunelveli - 5th respondent herein has been appointed as Special Public Prosecutor at District Sessions Court, Nagercoil to conduct the sessions Case pending in S.C.No.178 of 2001 by the Deputy Director of Prosecution, Tirunelveli.

9. Now, I shall consider whether the Deputy Director of Prosecution is competent to appoint the 5th respondent as Special Public

Prosecutor and the relevant provision relating to appointments of Public Prosecutors, Additional Public Prosecutors etc., Section 24 of the Code of Criminal Procedure speaks about Public Prosecutors and Section 25 relates to appointment of Assistant Public Prosecutors.

"Section 24: Public Prosecutors. - (1) For every High Court, the Central Government or the State Government shall after consultation with the High Court appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutor, for conducting in such court any prosecution, appeal or other proceeding on behalf of the Central Government or State Government as the case may be.
(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case of class of cases in any district or local area.
(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:
Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.
(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.
(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).
(6) Notwithstanding anything contained in sub-section where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:
Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor as the case may be from the panel of names prepared by the District Magistrate under sub-section (4).
(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) of subsection (2) or sub-section (3) or sub-section (6) only if he has been in practice as an advocate for not less than seven years.
(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.
(9) For the purpose of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an

advocate. "

Among various Sub-sections, Sub-section 3 is relevant for our cases. It is clear that in all cases the appointing authority is the State Government. Sub-section 8 enables the Central Government or the State Government to appoint a person as a Public Prosecutor for the purpose of any case or class of cases, who has been in practice as an Advocate for not less than 10 years as a Special Public Prosecutor for a particular case or class of cases.

" Section 25. Assistant Public Prosecutors. - (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.
(1-A)...
(2) .....
(3) ..... "

It is clear that for the purpose of conducting prosecutions in the Courts of Magistrates, the State Government can appoint one or more Assistant Public Prosecutors. Here again, the State Government is the appointing authority. There is no dispute that except the above provisions, there is no other provision which speaks about appointment of Public Prosecutor / Additional Public Prosecutor / Special Public Prosecutor / Assistant Public Prosecutors. It is also clear that the appointing authority is only the State Government

and the State has to follow certain procedures before appointing anyone as Public Prosecutor / Additional Public Prosecutor / Special Public Prosecutor / Assistant Public Prosecutor.

10. I have already referred to the proceedings of the Deputy Director of Prosecution dated 22.11.2002, addressed to the Principal District Judge, Kaniyakumari, wherein the Deputy Director has specifically stated that the 5th respondent - S. Thiyagarajan, APP Grade I, CCIW, Judicial Magistrate Court II, Tirunelveli has been appointed and he has to act as a Special Public Prosecutor at District Sessions Court, Nagercoil to conduct sessions case in S.C.No.178 of 2001. We are not concerned with the other appointments, since in both these writ petitions, the appointment of 5th respondent alone is under challenge. The learned Government Advocate by drawing my attention to the subsequent letter of the Deputy Director of Prosecution dated 13.12.2002, addressed to the Director of Prosecution would contend that the Deputy Director in the earlier communication dated 22.11.2002, wrongly described the appointment of the 5th respondent as "Special Public Prosecutor" and according to him (Deputy Director), it is an error due to inadvertence. She further submits that in the light of the said clarification of the Deputy Director dated 13.12.2002, it was not an order appointing the 5th respondent as a Special Public Prosecutor, but he had been deputed to conduct the trial of the Sessions Case in S.C. No.178 of 2001 by holding Additional Charge without prejudice. I have already referred to the proceedings of the Deputy Director of Prosecution dated 22.11.2002, wherein he has specifically stated that the 5 th respondent and 2 others were appointed as Special Public Prosecutors to conduct the cases pending in the District Sessions Court, Nagercoil. In such

a circumstance, the subsequent clarification dated 13.1 2.2002 cannot cure the initial defect.

11. Even otherwise, in the letter dated 13.12.2002, in the penultimate paragraph, the Deputy director has requested the Director of Prosecution, who has to pass orders, satisfying his order dated 22.11.200 2 and recommend to the Government to issue Government Order (G.O.) to that effect. The said passage shows that the Deputy Director was very well aware that it is only the State Government to appoint the Special Public Prosecutor under Section 24 (8) of the Code of Criminal procedure in the light of Sections 24 and 25 of Cr.P.C., neither the Deputy Director nor the Director of Prosecution has power to appoint the Public Prosecutor, Additional Public Prosecutor, Special Public Prosecutor, Assistant Public Prosecutor etc., Even for a particular term, the said power vests only with the State Government. Accordingly, the claim of the petitioners in both the writ petitions is well founded.

12. In this regard, it is also relevant to refer the decision of the Apex Court in the case of K.J. John vs. State of Kerala reported in 1990 (4) S.C.C. 191, wherein their Lordships after considering various sub-sections in Section 24 of Criminal Procedure Code have concluded that, the expression "regular cadre of prosecuting officers" in sub-section 6 means cadre having post of Public Prosecutor at the highest level. Their Lordships further held that where Assistant Public Prosecutors are members of regular Government service having their separate cadre whereas Public Prosecutors and Additional Public Prosecutors are appointed on contract basis for a fixed period and thus their posts are tenure posts. It is clear that the 5th respondent and two others were functioning as Assistant Public prosecutors in Judicial Magistrate Court and they are members of regular Government service having their separate cadre. On the other hand the Public Prosecutors, Additional Public Prosecutors, Special Public Prosecutors are tenure posts. Though in G.O.Ms.No.1766 Home (Courts VI) dated 05.12.1997 enables the Director of Prosecution to make additional charges from among the Assistant Public Prosecutors etc., undoubtedly, as said earlier, neither the Deputy Director nor even the Director of Prosecution has power to appoint the Public Prosecutor or Special Public Prosecutor or Additional Public Prosecutor. On the ground of lack of jurisdiction, the order of the Deputy Director dated 22.11.2002, appointing the 5th respondent as Special Public Prosecutor at District Sessions Court, Nagercopil cannot be sustained. Accordingly, both the writ petitions are allowed. No costs. Considering the earlier directions of this Court for early disposal of the sessions cases concerned, it is for the Government to take urgent steps by appointing Public Prosecutor / Special Public Prosecutor in accordance with law.

In view of the disposal of the main writ petitions, connected WPMPs., are closed.

Index:Yes
Internet:Yes

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To
1. The Secretary
State of Tamil Nadu
Home Department
Fort St. George, Chennai 600 009.

2. Deputy Director of Prosecution
No.45 Langar Kana Street
Palayamkottai
Tirunelveli 2.

3. The District Collector
Nagercoil, Kanyakumari District.

4. The Inspector of Police
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